Public Prosecutor v Kalaiselvan

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–22 OF 2000
AUGUSTINE PAUL J
28 FEBRUARY 2001

Criminal Procedure *— Acquittal or discharge — Acquittal and discharge of accussed without calling upon defence — Voluntariness of cautioned statement — Whether explanation of the caution to the accused was regular — Failure of the prosecution to call the officer arresting the accused and the investigating officer — Whether there was a serious gap in the prosecution case*

The accused was charged with trafficking in 807.4g of cannabis. When the prosecution sought to tender in evidence the cautioned statement the defence objected to its admissibility on the ground that it was not voluntarily made. The court had ordered a trial within a trial to be held to determine this issue. The only witness called by the prosecution to testify in the trial within a trial was PW6, the officer who recorded the cautioned statement from the accused. At the close of the prosecution case in the trial within a trial, the defence applied to make a submission of no case to answer with an option to call the accused as a witness should his submission fail. Counsel's submission of no case was anchored on two issues: (i) the explanation to the accused of the caution and the elements that constitute involuntariness were not reflected in the cautioned statement; and (ii) the failure of PW6 to ascertain the state of mind of the accused from the time he was arrested till he gave the cautioned statement was fatal. The court had invited both parties to submit on two matters: (i) whether the explanation of the caution to the accused was regular; and (ii) whether the prosecution ought to have called PW5, who arrested the accused and PW6, the investigating officer to whom the accused was handed to.

Held, acquitting the accused and discharging him without calling upon him to enter his defence:

(1) There is no requirement in s 37A of the Dangerous Drugs Act 1952 ('the Act') for the explanation to the accused of the caution and the elements that constitute involuntariness to form part of the record. What really the court has to concern itself was whether a scrutiny of the evidence and the surrounding circumstances show that the cautioned statement appears to have been caused by any inducement, threat or promise. Such a finding can be made by the court only after the accused has given evidence. The objection raised at this stage was therefore premature (see p 167B–D).

(2) The state of mind of the accused from the time he was arrested till he gave the cautioned statement can only be determined by the court upon a consideration of the relevant

evidence and not on any inquiry conducted by the recording officer (see pp 167H–168A). A

(3) The explanation of the caution by PW6 deviates from the requirement of the statutory caution in two respects. Firstly, the explanation conveyed to the accused means that if he chose not to make a statement to PW6 then he must make one in court. This makes it obligatory to make a statement and thus dilutes the right of the accused to remain silent which was subsequently communicated to him. Secondly, the explanation of the caution by PW6 to the accused did not refer to the part of the caution which states that there is no obligation '… to answer any question …'. The omission of the right of a person not to answer any questions in the administration of a caution will render the statement made inadmissible (see pp 169H, 170A, G). B C

(4) The prosecution could not withhold material evidence in its possession for the purpose of rebutting allegations raised by the accused. In view of the legal burden that has to be discharged by the prosecution to prove beyond reasonable doubt that the confession was voluntary, PW4 and PW5, being material witnesses, ought to have been called by the prosecution in the course of its case and not merely being reserved for giving evidence in rebuttal if the need arises. The obligation of the prosecution to call PW5 as a witness in the trial within a trial remained even though he had been cross examined on the issue of voluntariness in the main trial. In the circumstances the evidence led by the prosecution was insufficient in law to support a finding that the cautioned statement was given voluntarily. Thus the court ruled that the cautioned statement was not admissible (see p 174C, F–G). D E F

(5) It is settled law that for a person to be an 'occupier' of a room or premises within the meaning of s 37(b) of the Act he must have had exclusive occupation or exclusive use and care or management of the room or premises where the incriminating exhibits are found. The room from which the recovery of the dangerous drugs was made was not one that was ordinarily occupied by the accused. The mere presence of the accused in the room without more did not show that he had or appeared to have had care or management of the room. The presumption contained in s 37(b) of the Act could not therefore be invoked with the result that there was no evidence to show that the accused was the occupier of the premises. Section 37(g) of the Act was therefore of no avail to the prosecution (see p 175F–G). G H

(6) Even if the presumption applies, it only goes to show that the dangerous drugs were concealed with the knowledge of the accused. It is trite law that mere knowledge is insufficient to constitute possession of the dangerous drugs (see p 175G–H). I

[Bahasa Malaysia summary

Tertuduh didakwa dengan kesalahan mengedar 807.4g kanabis. Apabila pihak pendakwaan cuba mengemukakan keterangan pernyataan beramaran, pihak pembelaan membantah kebolehterimaannya atas alasan bahawa ia tidak diberi secara sukarela. Mahkamah telah mengarahkan agar perbicaraan dalam perbicaraan diadakan untuk memutuskan perkara ini. Saksi tunggal yang dipanggil oleh pendakwaan untuk memberi keterangan dalam perbicaraan dalam perbicaraan tersebut ialah SP6, pegawai polis yang merekodkan pernyataan beramaran dari tertuduh. Pada penghujung kes pendakwaan di perbicaraan dalam perbicaraan tersebut, pembelaan memohon membuat hujahan tiada kes untuk dijawab dengan pilihan menghubungi tertuduh sebagai saksi sekiranya hujahannya gagal. Hujahan peguam bahawa tiada kes bergantung kepada dua perkara: (i) penjelasan kepada tertuduh mengenai amaran tersebut dan unsur-unsur yang membentuk faktor tidak sukarela tidak dibayangkan dalam pernyataan beramaran tersebut; dan (ii) kegagalan SP6 untuk memastikan keadaan minda tertuduh dari waktu beliau ditahan sehingga beliau memberikan pernyataan beramaran tersebut adalah menjejaskan. Mahkamah telah mengundang kedua-dua pihak untuk mengemukakan hujahan atas dua perkara: (i) sama ada penjelasan amaran tersebut kepada tertuduh mengikut aturan; dan (ii) sama ada pihak pendakwaan patut memanggil SP5, yang menahan tertuduh dan SP6, pegawai penyiasatan yang mengendalikan tertuduh.

Diputuskan, membebaskan tertuduh dan melepaskannya tanpa memanggilnya mencatat pembelaan:

(1) Terdapat tiada keperluan dalam s 37A Akta Dadah Merbahaya 1952 ('Akta tersebut') bagi penjelasan kepada tertuduh mengenai amaran tersebut dan unsur-unsur yang membentuk ketidaksukarelaan untuk membentuk sebahagian daripada rekod. Apa yang patut dipentingkan oleh mahkamah ialah sama ada penelitian penjelasan dan hal keadaan sekitaran menunjukkan bahawa pernyataan beramaran tersebut dibuat akibat galakan, ugutan atau janji. Keputusan demikian boleh dibuat oleh mahkamah hanya selepas tertuduh selesai memberikan keterangan. Oleh itu, bantahan yang dikemukakan pada tahap ini belum sampai waktu (lihat ms 167B–D).

(2) Keadaan minda tertuduh dari ketika beliau ditahan sehingga ketika beliau memberi pernyataan beramaran hanya boleh diputuskan oleh mahkamah setelah mempertimbangkan keterangan yang relevan dan bukan atas apa-apa siasatan yang dikendalikan oleh pegawai yang mencatat (lihat ms 167H–168A).

(3) Penjelasan amaran oleh SP6 menyeleweng dari keperluan amaran statutori dalam dua aspek. Pertama, penjelasan yang diutamakan kepada tertuduh bermaksud sekiranya beliau enggan membuat

pernyataan kepada SP6, beliau harus membuat pernyataan di mahkamah. Ini membuatkannya wajib membuat pernyataan dan oleh itu, mengurangkan hak mendiamkan diri tertuduh yang kemudiannya diberitahu kepada tertuduh. Kedua, penjelasan amaran oleh SP6 kepada tertuduh tidak merujuk kepada bahagian amaran yang menyatakan bahawa tiada kewajipan '... untuk menjawab apa-apa soalan ...'. Peninggalan hak seseorang untuk tidak menjawab apa-apa soalan dalam pemberitahuan amaran akan menyebabkan pernyataan yang dibuat itu tidak boleh diterima (lihat ms 169H, 170A, G).

(4) Pendakwaan tidak boleh enggan memberikan keterangan material dalam milikannya bagi tujuan merebat tuduhan yang diutarakan oleh tertuduh. Memandangkan beban undang-undang pendakwaan untuk membuktikan melampaui keraguan yang munasabah bahawa pengakuan tersebut dibuat secara sukarela, SP4 dan SP5, kerana merupakan saksi material, sepatutnya dipanggil oleh pendakwaan dalam perjalanan kes dan bukan hanya dirizabkan untuk memberikan keterangan perebatan jika keperluan itu timbul. Kewajipan pendakwaan memanggil SP5 sebagai saksi dalam perbicaraan dalam perbicaraan tersebut tetap wujud walaupun beliau telah diperiksa balas atas isu kesukarelaan dalam perbicaraan utama. Dalam hal keadaan seperti itu, keterangan yang dikemukakan oleh pendakwaan tidak mencukupi di sisi undang-undang untuk menyokong keputusan bahawa pernyataan beramaran tersebut diberi secara sukarela. Oleh itu, mahkamah memutuskan bahawa pernyataan beramaran tersebut tidak boleh diterima (lihat ms 174C, F–G).

(5) Ia jelas bahawa bagi menggelar seseorang itu 'penghuni' sebuah bilik atau premis dalam maksud s 37(b) Akta tersebut, beliau mestilah mempunyai penghunian eksklusif atau penggunaan dan penjagaan atau pengurusan eksklusif bilik atau premis tersebut di mana eksibit yang menunjukkan salah tersebut dijumpai. Bilik di mana dadah merbahaya tersebut dijumpai bukanlah bilik yang lazimnya dihuni oleh tertuduh. Kehadiran semata-mata tertuduh di dalam bilik tersebut tanpa apa-apa keterangan yang lain tidak menunjukkan bahawa beliau telah atau kelihatan telah mempunyai penjagaan atau pengurusan bilik tersebut. Anggapan yang terkandung di dalam s 37(b) Akta tersebut tidak boleh dikemukakan, dengan keputusan bahawa tiada keterangan menunjukkan yang tertuduh ialah penghuni premis tersebut. Oleh itu, s 37(g) Akta tersebut tidak membantu kes pendakwaan langsung (lihat ms 175F–G).

(6) Sungguhpun anggapan tersebut boleh digunakan, ia hanya membuktikan bahawa dadah merbahaya tersebut disembunyikan dengan pengetahuan tertuduh. Ia diketahui bahawa pengetahuan semata-mata tidak mencukupi untuk membentuk pemilikan dadah merbahaya (lihat ms 175G–H).

Notes

For cases on acquittal or discharge generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 65–118.

Cases referred to

Abdul Mahmud v PP [1980] 2 MLJ 50 (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Aziz bin Muhamad Din v PP [1996] 5 MLJ 473 (refd)
Boudreau v The King [1949] 94 CCC1 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Chua Poh Kiat Anthony v PP [1998] 2 SLR 713 (refd)
Erven v The Queen [1979] 92 DLR (3d) 507 (refd)
Ex parte Whitefock; Re Mackenzie [1971] 2 NSWLR 534 (refd)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321 (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322 (refd)
Lim Seng Chuan v PP [1977] 1 MLJ 171 (refd)
Lim Sing Hiaw v PP [1965] MLJ 85 (refd)
Mohamed Yusof bin Haji Ahmad v PP [1983] 2 MLJ 167 (refd)
Poon Heong v PP [1949] MLJ 114 (refd)
PP v Aidil bin Ma'rof [1992] 2 CLJ 1239 (refd)
PP v Aris bin Yunus [1989] 1 CLJ 239 (refd)
PP v Badrulshan bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chan Choon Keong & Ors [1989] 2 MLJ 427 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
PP v Chong Boo See [1988] CLJ 678 (refd)
PP v Kadir bin Awang [1989] 2 MLJ 33 (refd)
PP v Kang Choo Heng & Anor [1991] 3 CLJ 2574 (refd)
PP v Khoo Boo Hock & Anor [1990] 2 CLJ 971 (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74 (refd)
PP v Law Say Seck & Ors [1971] 1 MLJ 199 (refd)
PP v Lee Chee Meng [1991] 1 MLJ 226 (refd)
PP v Md Alim bin Samad [1998] 1 MLJ 260 (refd)
PP v Mohd Fairuz bin Omar [1998] 5 MLJ 729 (refd)
PP v Mohd Fuzi bin Wan Teh & Anor [1989] 2 CLJ 652 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)
PP v Muniandy & Ors (Selangor Criminal Trial No 58–10–86, unreported) (refd)
PP v Ong Cheng Heong [1998] 4 CLJ 209 (refd)
PP v Sukumaran a/l Sudram [1999] 4 MLJ 462 (refd)
PP v Tan Boon Tat [1990] 2 MLJ 466 (refd)
PP v Teh Lye Tong [1958] 3 MC 208 (refd)
PP v Yap Hai Ling [1990] 1 CLJ 983 (refd)
R v Bannerman [1966] 48 CR 110 (refd)
R v Bradshaw [1978] 18 SASR 83 (refd)
R v Brophy [1981] 2 All ER 705 (refd)

R v Haughton (No 2) [1982] 38 OR (2d) 496 (refd)
R v Hebert [1990] 57 CCC (3d) 1 (SCC) (refd)
R v Settee [1974] 22 CCC (2d) 193 (Sask CA) (refd)
R v Williams [1976] 14 SASR (refd)
R v Wilson [1970] 1 CCC (2d) 14 (BCCA) (refd)
Sankey v The King (1927) 48 CCC 97 (refd)
Tan Too Kia v PP [1980] 2 MLJ 187 (refd)
Teng Boon How v Pendakwa Raya [1993] 3 MLJ 553 (refd)
The Queen v Chin (1984) 157 CLR 671 (refd)
Thiffault v The King [1933] 60 CCC 97 (refd)
Wong Kam-ming v The Queen [1979] 1 All ER 705 (refd)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Dangerous Drugs Acts 1952 ss 37(b), (d), (g), 37A, (1), (1)(b), 39B(l)(a), (2)

Azhar bin Abdul Hamid (Attorney General's Chambers) for the prosecution.

M Sathia (*M Sathia & Assoc*) for the accused.

Augustine Paul J: **.** The charge preferred against Kalaiselvan ('the accused') is for trafficking in 807.4g of cannabis, an offence under s 39B(l)(a) of the Dangerous Drugs Act ('the Act') and punishable under s 39B(2) of the Act.

On 2 September 1999 at 3.30am, Chief Inspector Gunalan ('PW5') led a party of police officers to premises number 567, Kampong Loke Yew, Jalan Semarak, Kuala Lumpur to arrest the accused upon information received to the effect that he was involved in the theft of motor vehicles. Upon arrival at the premises PW5 knocked at the door which was opened by Ramaniam ('PW7'), the father of the accused. PW5 went into the house with two other police officers. He saw a lady sleeping in the hall. She is Kalivani and is the mother of the accused. PW5 asked PW7 whether a person named Selvan was staying in the house. PW7 nodded his head and took PW5 to the room where the accused was sleeping. It is room No B2 in exh P3, a sketch plan of the house, and had no door. The accused was then woken up. PW5 searched the room. From a cupboard in the room he recovered a black lady's hand bag (exh P8). Exhibit P8 was hidden amongst the clothes and was not noticeable when the unlocked sliding doors of the cupboard were opened. PW5 opened exh P8 and found that it had three packets containing compressed dried leaves (exhs P12AI, P12BI and P12CI) suspected to be cannabis. The accused was then handcuffed and arrested together with PW7 and Kalivani. Another Indian male named Anabalangan ('PW8'), the brother of the accused, who was in the premises was also arrested. PW5 then took the four person Sentul Police Station together with the exhibits. He handed them to Chief Inspector Wan Azlan

bin Wan Mamat ('PW4'), the investigating officer. In his cross examination PW5 said,

> Saya tidak setuju bahawa saya memaksa OKT mengaku barang-barang rampasan adalah haknya. Saya tidak setuju OKT dibawa ke pejabat saya dan dibelasah oleh anggota saya. Saya tidak memaksa OKT untuk mengaku bahawa barang kes adalah milik OKT. Saya ta' setuju bahawa apabila OKT enggan mengaku saya akan menangkap ibu dan bapanya. Saya ta' setuju bahawa selepas itu sahaja kita balik ke tempat kejadian untuk menangkap ibu dan bapa OKT sementara OKT dan abangnya menunggu di kenderaan polis.

He added that neither he nor his officers assaulted the accused. PW7, in his evidence, identified the rooms occupied by the different members of his family with the aid of exh P9. His wife, Kalivani sleeps in the hall. He himself occupies room No Bl while the accused's room is No B4. Room No B2 was occupied by his daughter. After her marriage both his sons used the room. He said that during weekends his daughter's three children stay in the room. They are a set of twins aged nine and a son aged 11. In narrating the arrest of the accused he said that when he woke up, the accused had already been handcuffed. At that time the accused was in room No B2. He then said.

> A policeman was holding a bag. I am not sure of the colour. I do not know whose bag it was.
>
> Q: Can you describe the bag further?
>
> A: I only remember that the colour of the bag is black. That is all. It is about one foot long. I did not have a good look at the bag.

In his evidence PW8 said that his room is No B5. He added that he sleeps in room No B2 whenever he drinks. He said that on the day in question when the police came he got frightened and ran. He hid behind the refrigerator. He was arrested. He then added, 'I did not see the police recovering anything from the house. I only saw a policeman carrying a bag. I did not really notice the bag as I thought it belonged to the police. The colour of the bag could be black or brown. I have not seen the bag before the incident. During the times I used room B2, I have not seen this bag there. On that night I was sleeping in room B5.

PW4 sent exhs P12A1, P12B1 and P12C1 to the chemistry department for analysis on 11 September 1999 and received them back on 17 December 1999 together with a chemist report (exh P11). He served a copy of exh P11 on the accused. On 3 September 1999, PW4 asked Inspector Ho Chee Khun ('PW6') to record a cautioned statement from the accused which he did.

When the prosecution sought to tender in evidence the cautioned statement, the defence objected to its admissibility on the ground that it was not voluntarily made. I promptly ordered that a trial within a trial be held to determine this issue. The only witness called by the prosecution to testify in the trial within a trial was PW6. He said that on 3 September 1999, PW4 asked him to record a cautioned statement from the accused. The statement

was recorded in his office. He said that he commenced recording the statement at 11am and concluded his task at about 11.30am. He conversed with the accused in Bahasa Malaysia who understood the language. There was nobody else in the office at that time. The accused was in good health. PW6 examined the body of the accused and found no marks. The accused also did not make any complaints to him. PW6 then read the statutory caution under s 37A(1)(b) of the Act to the accused. Having read out the caution PW6 proceeded to explain it to the accused. As he said in his evidence:

> Selepas itu saya ada jelaskan maksud amaran kepada OKT. Saya telah memberi pilihan kepada OKT di mana OKT boleh memberi percakapan kepada saya ataupun di mahkamah. Ini adalah penjelasan yang saya beri kepada OKT. Saya juga memberitahu OKT sekiranya OKT ingin memberi percakapan kepada saya percakapan tersebut akan dijadikan sebagai keterangan di mahkamah. Saya bertanyakan OKT sama ada percakapan diberi sukarela atau tidak. (Saksi diminta amaran yang dibacakan kepada saksi) 'Ada menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan. Tetapi apa-apa jua yang kamu nyatakan sama ada sebagai jawapan kepada sesuatu soalan atau tidak bolehlah diberi sebagai keterangan.' Saya bacakan amaran sekali. Selepas itu OKT tidak tanya saya apa-apa. Saya bacakan amaran dan kemudian memberi penjelasan iaitu pilihan kepada OKT. Saya memberi penjelasan sekali. Saya juga memberitahu OKT bahawa dia juga ada hak mendiamkan diri. Saya pasti OKT faham amaran dan penjelasan. Selepas itu saya telah mengambil percakapan dari OKT.

The accused then affixed his signature on the first page of the statement containing the caution. After the statement was recorded, PW6 read it back to the accused who had no corrections or amendments to make. The accused then affixed his signature at the foot of the statement followed by PW6. PW6 also confirmed that he did not hold out any threat, inducement or promise to the accused and that he had explained the meaning of these elements to the accused. The prosecution then closed its case in the trial within a trial. No witnesses were offered to the defence. Learned counsel for the accused then applied to make a submission of no case to answer with an option to call the accused as a witness should his submission fail.

Learned counsel's anxiety to ensure that he has a right to call evidence should his submission of no case fail is understandable in view of the conflicting local authorities in this area of the law. In ruling that the defence has no right to make a submission of no case at the end of the case for the prosecution in a trial within a trial unless there is an election of not calling any evidence, Shankar J (as he then was) said in *PP v Muniandy & Ors* (Selangor Criminal Trial No 58–10–86, unreported):

> When the prosecution witnesses had concluded their evidence in the trial within the trial, the defence counsel sought to make a 'submission of no case to answer'. The objective of this exercise was to forestall the problem of having to elect whether the accused should give evidence in the trial within the trial

until a ruling had first been obtained on admissibility based purely on the prosecution evidence.

> I am unable to accede to the defence submission that I had to put the matter on par with a situation where having found there was a case to answer I ordered the accused to enter into his defence. We were not concerned with his guilt at this stage, only with admissibility. So I ruled the submission premature and directed the accused to elect whether they wished to give evidence.

However, in *PP v Aidil bin Ma'rof* [1992] 2 CLJ 1239, Chong Siew Fai J (as he then was) allowed counsel for the defence to submit at the conclusion of the prosecution case in a trial within a trial without any election. Though his Lordship overruled the defence's submission, he said at p 1242:

> There is evidence upon which conclusions are capable of being drawn that the statutory caution was duly and properly administered and that no threat, inducement or promise was made to the accused. The 'trial – within – trial' is to continue, at the end of which I shall further consider all the evidence adduced including that of the defence, if any, in their context and decide on the admissibility or otherwise of the contested statement.

A consideration of the nature of a trial within a trial will help to resolve the problem at hand. It is sometimes referred to as a voir dire and is a descriptive phrase to describe a procedure adopted to determine the admissibility of certain evidence. In a trial within a trial held to determine the voluntariness of a confession the legal burden is on the prosecution to prove voluntariness beyond reasonable doubt (see *PP v Chong Boo* See [1988] 1 CLJ 678). Thus the prosecution must adduce sufficient evidence of the facts in the course of its case to show that the statement was obtained voluntarily. The accused is entitled to call evidence to the contrary. The normal rules of examination of witnesses apply in a trial within a trial. As Syed Agil Barakbah J (as he then was) said *Abdul Mahmud v PP* [1980] 2 MLJ 50 at p 51:

> The accused is entitled to cross examination and thereafter to give evidence in support of his objection. Similarly the prosecution is also entitled to cross examine the accused and his witnesses, if any.

It is settled law that evidence adduced in a trial within a trial cannot be used against the accused in the main trial. Thus as Meares J said in *Ex parte Whitelock; Re Mackenzie* [1971] 2 NSWLR 534 the voir dire is entirely separate from the trial proper. Wells J in *R v Williams* [1976] 14 SASR, made the observation that the voir dire...' stands apart from the usual and regular conduct of a criminal trial... (at p 2). In *R v Bradshaw* [1978] 18 SASR 83, King J expressed the view that the voir dire hearing is not part of the trial proper. In *R v Bannerman* [1966] 48 CR 110, Miller CJM accepted that the voir dire must be kept separate from the trial itself. In *Chua Poh Kiat Anthony v PP* [1998] 2 SLR 713 and *Lim Seng Chuan v PP* [1977] 1 MLJ 171, it was held that the fundamental principle of the administration of justice is that a voir dire ought to be considered a separate

or collateral proceeding. Be that as it may, a trial within a trial cannot be equated with an ordinary criminal trial for all purposes from a procedural point of view. There is at least one vital difference between both the proceedings. It relates to the right of an accused to make a submission of no case at the end of the case for the prosecution. In an ordinary criminal trial the prosecution must make out a prima facie case at the end of its case failing which the accused is entitled to an acquittal. This gives him a right to make a submission of no case to answer. In the light of the subjective consideration underlying the test of voluntariness in a trial within a trial, the accused must discharge the evidential burden of establishing the allegations raised by him. He must show that the inducement, threat or promise complained of affected his mind in causing him to make the statement (see *PP v Teh Lye Tong* [1958] 3 MC 208; *PP v Law Say Seck & Ors* [1971] 1 MLJ 199; *Aziz bin Muhamad Din v PP* [1996] 5 MLJ 473). Thus, as stated by the Privy Council in *Wong Kam-ming v The Queen* [1979] 1 All ER 705, the accused can almost never make an effective challenge to the admissibility of the statement without giving evidence himself. He is therefore virtually compelled to give evidence (see *R v Brophy* [1981] 2 All ER 705). It is only when he has discharged his evidential burden that it becomes the function of the court to determine the issue of voluntariness (see *Aziz bin Muhamad Din v PP* [1996] 5 MLJ 473). The court must therefore hear the accused before making a ruling on voluntariness. This means that the question of the prosecution making out a prima facie case in a trial within a trial does not arise before the accused is called upon to testify. This will preclude the making of a submission of no case to answer at the end of the prosecution case as in an ordinary trial. As an illustration I refer to a trial within a trial where the evidence adduced by the prosecution shows that some threat was used on the accused. No ruling can be made on the effect of this evidence at the end of the case for the prosecution. Its real value will only emerge when the accused testifies to explain that the threat 'caused' him to make the cautioned statement. As I explained earlier, it is only then that the court can make a ruling. However, a submission of no case to answer can be made if it is based on grounds which do not require the testimony of the accused. It can be made on a point of law, as for example, when the required caution has not been administered in accordance with law or when the evidence adduced is insufficient in law. Evidence would be insufficient in law when the prosecution has failed to call some material witnesses. In these instances, a ruling can be made based merely on the evidence adduced by the prosecution, and it would be an exercise in futility to carry on with the trial within a trial to its conclusion as, the result would be the same even if the accused were to testify. If, however, a point of law raised is not successful there ought to be no prohibition on the accused giving evidence on the facts as the facts would not and could not have been the basis of the submission. Any curtailment of the right of the accused to call evidence if the submission fails will amount to a denial of justice as the accused will be prevented from discharging the evidential burden on him. This is particularly significant in view of the subjective consideration involved in making a

ruling which requires the evidence of the accused to be taken into account. I am therefore of the view that the accused has the right to make a submission of no case to answer on points of law at the close of the case for the prosecution, and, if the submission fails he has the right to give evidence and call witnesses.

Learned counsel's submission of no case was anchored on two issues. Firstly, he contended that the explanation to the accused of the caution and the elements that constitute involuntariness are not reflected in the cautioned statement. The short answer to this objection is that there is no requirement in s 37A of the Act for these matters to form part of the record. This of course does not mean that the objection raised is without merit. What the court really has to concern itself with is whether a scrutiny of the evidence and the surrounding circumstances show that the cautioned statement appears to have been caused by any inducement, threat or promise. If the accused felt that he had to make a statement whether he likes it or not then the caution that is administered loses its efficacy and the whole purpose and intention of s 37A of the Act is defeated (see *Mohamed Yusof bin Haji Ahmad v PP* [1983] 2 MLJ 167). Such a finding can only be made by the court after the accused has given evidence. The objection raised at this stage is therefore premature. Secondly, learned counsel contended that the failure of PW6 to ascertain the state of mind of the accused from the time he was arrested till he gave the cautioned statement is fatal. An inquiry of this nature conducted by PW6, if any, only serves the purpose of satisfying himself that the accused was giving the statement voluntarily. Any conclusion that he arrives at will be his own assessment of the state of mind of the accused. This overlooks the requirement of s 37A(1) of the Act which provides that it is the function of the court to ascertain whether the statement was given voluntarily and not that of the recording officer. Reliance on such evidence from the recording officer would amount to the court abdicating its duty. In the Canadian Supreme Court case of *Sankey v The King* (1927) 48 CCC 97 it was held that rarely, if ever, can the burden of proof that rests on the prosecution be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion by the police officer who obtained it, that it was made freely and voluntarily. As Anglin CJC said at p 101:

> With all the facts before him, the judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission rather than accept the mere opinion of the police officer, who had obtained it, that it was made 'voluntarily and freely'.

In fact, as stated in *R v Wilson* [1970] 1 CCC (2d) 14 (BCCA), the police officer should not even be asked that question. Such questioning will infringe the ultimate issue rule whereby witnesses may not be asked the question which the court itself has to decide. The state of mind of the accused from the time he was arrested till he gave the cautioned statement can therefore only be determined by the court upon a consideration of the relevant evidence and not on any inquiry conducted by the recording

officer. I was therefore of the view that this objection too was without any merit.

Before the learned deputy public prosecutor could commence his reply I invited both parties to submit on two matters which were quite apparent on the evidence adduced. They are:

(a) whether the explanation of the caution to the accused was regular; and

(b) whether the prosecution ought to have called PW4 and PW5 as witnesses.

Both parties submitted on the two matters raised. I shall now consider them.

Whether the explanation of the caution to the accused was regular

The caution, as prescribed in s 37A(1)(b) of the Act, is in the following words:

> it is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

After having read out the caution to the accused in its proper form PW6 proceeded to explain it. Before considering the regularity of the explanation of the caution offered to the accused and its effect, if irregular, I shall first consider the need for such an explanation. In *PP v Chan Choon Keong & Ors* [1989] 2 MLJ 427, it was held that a proper caution had not been administered as it had not been properly and fully explained so that the accused could understand it. In *PP v Lee Chee Meng* [1991] 1 MLJ 226, it was held that the statement recorded was inadmissible as it did not contain any statement to the effect that the accused understood it. In *PP v Kang Choo Heng & Anor* [1991] 3 CLJ 2574, Richard Tallala J in commenting on the need to explain the caution said at p 2579:

> In this regard it is significant that in answer to the alleged caution Inspector Guan said that the accused merely nodded. Inspector Guan admitted to not being a qualified interpreter. In this regard I respectfully agree with the dictum of Shaik Daud J in *PP v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652 at p 654 that a caution should not merely be read but also explained to the accused along with its consequences. There is no evidence that this was done in this case.'

In *PP v Muniandy & Or*s (Selangor Criminal Trial No 58–10–86, unreported) It was contended on the authority of *PP v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652 that the caution should have been explained to the accused and that he should have been asked why he wanted to confess. In answer to this Shankar J (as he then was) said:

> Whether a caution has to be explained, and if so how it should be explained, to a person depends upon the circumstances of the case. The first accused spoke fluent English. No explanation was necessary.

In *PP v Aidil bin Ma'rof* [1992] 2 CLJ 1239, Chong Siew Fai J (as he then was) said at p 1241 that explaining the caution to an accused is good and recommendable practice but added that:

> ... mere failure to do so does not, in itself, necessarily render a cautioned statement inadmissible, in evidence. Much depends on the facts and circumstances of each case. The important consideration is that it must be ensured that the giver of the statement fully understands the caution. So far as the present proceedings go, there is evidence from the inspector and in ID21 that the accused understood the caution administered.

In *Tan Too Kia v PP* [1980] 2 MLJ 187, it was held that what is important is that the person interrogated should understand the language used by the interrogator. In *Mohamed Yusof bin Haji Ahmad v PP*, Syed Agil Barakbah J (as he then was) said, in line with the latter line of authorities that I have referred to, that there is no requirement for the accused to be asked whether he understood the caution. His Lordship added that nevertheless it is vital for the court to determine by scrutiny of the evidence and the surrounding circumstances whether the statement given appears to have been caused by any inducement, threat or promise from a person in authority. If the accused felt that he had to make a statement whether he likes it or not, then, as his Lordship added at p 169:

> ... the caution that is administered loses its efficacy and the whole purpose and intention of the provision is thereby defeated.

I agree that there is no requirement in s 37A of the Act for the caution to be explained to the person giving a statement. What is significant is that the statement must have been given voluntarily without any feeling of compulsion by the accused that he had to make a statement. A statement given with such a state of mind deprives the caution of its effect. A determination of this issue will, of course, depend on the circumstances of each case. Where, however, the caution has been explained, it is my view that the explanation offered must not deviate from the language and spirit of the caution as prescribed by law. It follows that a caution read out in its regular form but subsequently explained in an irregular manner will lose its value as a properly administered caution.

PW6 first read the caution to the accused and then explained it. PW6 told the accused that he has the option of giving a statement either to him or in court. The accused was told that if he gave a statement to PW6 it would be used as evidence in court. Upon further questioning, PW6 said that he also informed the accused of his right to remain silent. He said that the accused understood the caution and the explanation. In my opinion, the explanation of the caution by PW6 deviates from the requirements of the statutory caution in two respects. Firstly, the explanation conveyed to the accused means that if he chose not to make a statement to PW6 then he must make one in court. This makes it obligatory to make a statement and thus dilutes the right of the accused to remain silent which was subsequently communicated to him. The right of silence is defined objectively rather than subjectively and any police conduct which effectively and unfairly deprives a suspect of the right to choose whether to speak to the authorities or not

affects the right (see *R v Hebert* [1990] 57 CCC (3d) 1 (SCC). Thus the accused's right of silence, inherent in the caution (see *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553; *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209), has been infringed. Secondly, the explanation of the caution by PW6 to the accused did not refer to the part of the caution which states that there is no obligation '... to answer any question...'. It is true that PW6 told the accused that he has the option of giving a statement to him. But he did not tell the accused that he is also not obliged to answer any questions. There is, however, a difference between the right of not giving a statement and the right of not answering any question. In commenting on the failure to administer the latter part of the caution Willan CJ said in *Poon Heong v PP* [1949] MLJ 114 at p 115:

> We agree with that part of the judgment of Spenser-Wilkinson J in *PP v Lee Weng* which reads:
>
> > 'The amendment of reg 33 followed a decision of the Court of Appeal to the effect that under that regulation as it then stood questions should not be asked in eliciting a statement thereunder. It has been thought right by amending the law to allow questions to be put in taking such statements, but in making the change the legislature has been careful to lay down certain pre-requisites before the statement may be taken. I think the emphatic repetition of the reference to questions in the amended regulation is deliberate and that the words have been inserted in both parts of the caution for two reasons; the first is that suggested by Mr. Chia, namely, that the first part of the caution up to the comma is the actual warning part, whereas the latter part merely indicates the use to which the statement may be put; and the other is that, if questions are to be allowed, the provisions of paragraph (2) of the regulation have to be emphasized because otherwise an accused person familiar with the normal law under s 112 of Criminal Procedure Code, but unfamiliar with the regulations might think that he was legally bound to answer the questions and to answer them truly. Section 112 has existed for so long that such a state of mind could not, I think, be considered unreasonable.'
>
> As to (3) a police officer cannot be allowed to change a statutory form of caution merely because he does not propose to ask an accused person any questions.
>
> For these reasons we decided that the statement should not have been admitted in evidence at the trial of the appellant.

Thus the omission of the right of a person not to answer any questions in the administration of a caution will render the statement made inadmissible. A statement with a similar defect was held inadmissible in *PP v Badrulshan bin Baharom* [1988] 2 MLJ 585. This is sufficient to render the cautioned statement in this case inadmissible.

Whether the prosecution ought to have called PW4 and PW5 as witnesses

The evidence adduced reveals that the accused was arrested by PW5 on 2 September 1999 at about 3.30am. He was then taken to the Sentul Police Station and handed over to PW4. On 3 September 1999, PW4 handed over the accused to PW6 at about 11am for the purpose of recording the

cautioned statement. The only witness whom the prosecution called in the trial within a trial to show that the cautioned statement was voluntarily given was PW6. Learned counsel for the accused contended that the burden is on the prosecution to establish that nothing transpired from the time the accused was arrested until he was handed to PW6 to render the cautioned statement involuntary. In the circumstances, he said, the prosecution ought to have called PW4 and PW5 as witnesses in the trial within a trial. In his reply the learned deputy public prosecutor said that the evidence of PW6 that the accused gave the cautioned statement voluntarily remains uncontradicted. This means, he said, the prosecution has discharged its evidential burden and that there is only a need for the prosecution to adduce evidence in rebuttal if, in fact, the accused had made allegations in his evidence. He concluded by saying that there is no obligation on the prosecution to call any further evidence as the accused, by not having given any evidence, has not made any allegations warranting rebuttal. The first part of the submission has only to be stated to be rejected as the evidence of PW6 on the voluntariness of the statement, being his opinion, is insufficient to discharge the legal burden on the prosecution as I said in an earlier part of the judgment. Before dealing with the second part of the submission it is pertinent to consider the type of evidence that the prosecution must adduce in a trial within a trial.

The general rule is that the prosecution must adduce sufficient evidence of the facts to show that a cautioned statement was obtained voluntarily in order to discharge the legal burden that it bears. In *Boudreau v The King* [1949] 94 CCC1 it was held that all the surrounding circumstances must be investigated and, if upon their review the court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Thus all persons who had anything to do with the accused during the period before the statement was made must be called as witnesses. Accordingly, as Dickson J said in *Erven v The Queen* [1979] 92 DLR (3d) 507 at p 519 the witnesses who should normally be called would be:

> ... the police officer to whom the statement was made or given, and any other police officers who might have been in a position to threaten or to offer hope of advantage to the accused. These witnesses testify affirmatively to statements made and to the absence of threat or promise.

Thus the Singapore High Court in *PP v Tan Boon Tat* [1990] 2 MLJ 466 examined at p 471:

> ... the evidence of the events that occurred between the time of the arrest of the accused and the time when the statement was recorded to see whether any inducement, threat or promise was made to the accused which caused him to make the statement which was made.

Similarly in *Lim Sing Hiaw v PP* [1965] 1 MLJ 85 the Federal Court took exception to the fact that (at p 89):

> ... no attempt was made to call any police or army officer who could say what happened to the appellant during the three days he was in custody prior to making his statement to Inspector Lingam.

Where a witness is considered material in order to establish the voluntariness of the statement the failure to call him is fatal. In this regard Duff CJC in speaking for the Supreme Court of Canada in *Thiffault v The King* [1933] 60 CCC 97 said at p 103:

> Where such a statement is elicited in the presence of several officers the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses... and, where the statement professes to give the substance of a report of oral answers (given to questions)... ought not to be admitted... unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.

Where an important witness is not available to give evidence his absence must be adequately explained. In commenting on what is an adequate explanation PK McWilliams in his book *Canadian Criminal Evidence* (1988) (3rd Ed) says at paras 15–80,

> If it means that the witness was only incidentally involved with the accused that may be reasonable, but if it is simply that the witness is, for example, away moose hunting, then it is not. In *R v Botfield* [1973] 28 CCC (2d) 472 (BCCA) the fact that a store detective was ill in hospital was rejected as being an inadequate explanation.

I must add that even though the absence of a material witness has been adequately explained thereby precluding an adverse inference from being drawn against the prosecution, yet the failure to produce the witness to testify may result in the prosecution not being able to discharge its burden if the testimony of that witness is essential for the unfolding of its case. A case cannot be said to have been proved simply by explaining away the absence of a witness whose evidence is crucial. Be that as it may, there is no burden upon the prosecution to call everyone who had contact with the accused however peripheral or insignificant his role (see *R v Haughton* (No 2) [1982] 38 OR (2d) 496. Thus in *R v Settee* [1974] 22 CCC (2d) 193 (Sask CA) it was held that it was not necessary to call witnesses who had escorted the prisoner and did not take part in the interrogation.

It is now appropriate to consider the second part of the submission made by the learned deputy public prosecutor. Cases such as *Lim Sing Hiaw v PP* [1965] MLJ 85 and *PP v Tan Boon Tat* [1990] 2 MLJ 466 do not support the proposition, as contended by the learned deputy public prosecutor, that there is an onus on the prosecution to call witnesses only to rebut allegations raised by the accused in his evidence. It is a fundamental principle of our criminal law that in deciding on the issue of admissibility of a confession made by an accused person, the onus is not on the accused to show involuntariness but on the prosecution to prove beyond reasonable doubt that the confession was voluntary (see *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321). Thus if the prosecution is only obliged to rebut allegations raised it means that the accused must first make out a case of involuntariness before the burden shifts. This will place an unwarranted

evidential burden on the accused. As Dickson J said in *Erven v The Queen* [1979] 92 DLR (3d) 507 at p 524:

> The effect of limiting the voir dire to cases where there is evidence of involuntariness is to obligate the accused to adduce such evidence, thereby relieving the Crown of a burden which properly rests on the Crown and placing an unwarranted evidential burden upon the accused.

The prosecution must therefore call its material witnesses in the course of its case as I explained earlier. The argument advanced by the learned deputy public prosecutor is also contrary to the principles governing the calling of evidence in rebuttal which is allowed only in very special or exceptional circumstances (see *PP v Chia Leong Foo* [2000] 6 MLJ 705). The duty of the prosecution is to present completely the evidence upon which it relies to discharge its burden in the course of its case and not split its case by reserving some evidence to be called in rebuttal. As Dawson J said in *The Queen v Chin* (1984) 157 CLR 671 at pp 684–685:

> The prosecution may be permitted to adduce evidence after the close of the defence case in the discretion of the trial judge. The discretion is, however, to be exercised in favour of the prosecution only in exceptional circumstances and the guiding principle is that the prosecution ought not to be permitted to split its case. That is to say, the prosecution must call all the evidence available to it in support of its case during the presentation of that case. If it fails to do so, it ought not to be allowed to remedy the situation by calling evidence in reply except in exceptional circumstances. Beyond saying that exceptional circumstances do not embrace a situation which ought reasonably to have been foreseen by the prosecution or which would have been covered if the prosecution case had been fully and strictly proved, this court has declined, having regard to the multifarious directions which a criminal trial may take, to lay down any rigid formula ...
>
> Where evidence which the prosecution seeks to call by way of rebuttal is also confirmation of the case which it has sought to make, the trial judge must exercise his discretion to ensure the observance of the principle which finds its expression in the rules which have been laid down: see *Killick*'s case. If the evidence was only of marginal, minimal or doubtful relevance to the prosecution case, it may properly be admitted to rebut the defence case. There is also authority for the proposition that the prosecution may be permitted to reopen its case to repair omissions of a formal, technical or non- contentious nature: see *Archbold's Criminal Pleading, Evidence and Practice* (41st Ed, 1982) paras 4–414, and the cases there cited.

As Gibbs CJ and Wilson J said in the same case as p 676:

> The general principle is that the prosecution must present its case completely before the accused is called upon for his defence. Although the trial judge has a discretion to allow the prosecution to call further evidence after evidence has been given for the defence, he should permit the prosecution to call evidence at that stage only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen. The principle applies where the prosecution seeks to call evidence to rebut matters raised for the first time by the defence; if the rebutting evidence was itself relevant to prove the prosecution case (unless, perhaps, it was no more than marginally,

minimally or doubtfully relevant: *Reg v Levy & Tait* [1966] 50 Cr App R 198) and the need to give it could have been foreseen it will, generally speaking, be rejected.

The prosecution cannot therefore call evidence to rebut matters that could have been foreseen or if such evidence was itself relevant to prove its case. Where, however, the accused in his evidence makes allegations against persons considered by the prosecution to be not material in establishing the voluntariness of the statement by virtue of them being of marginal, minimal or doubtful relevance they may be called to give evidence in rebuttal. In *Tan Too Kia v PP* [1980] 2 MLJ 187 where the Federal Court commented on the failure by the prosecution to call evidence in rebuttal against whom the accused had made allegations must therefore be understood in that light. The prosecution cannot therefore withhold material evidence in its possession for the purpose of rebutting allegations raised by the accused. In view of the legal burden that has to be discharged by the prosecution, it is my view that PW4 and PW5, being material witnesses, ought to have been called by the prosecution in the course of its case and not merely being reserved for giving evidence in rebuttal if the need arises. The remaining matter for consideration is whether PW5 must still have been called as a witness in the trial within a trial even though he had been cross examined on the issue of voluntariness in the main trial. This raises the question of whether evidence adduced in the substantive trial can be used as evidence in the trial within a trial. In *PP v Kadir bin Awang* [1989] 2 MLJ 33, the medical evidence of a doctor given in the substantive trial was considered in the trial within a trial. It is, however, my view that the reception of such evidence must be restricted to matters of a formal nature and not to material evidence as the voluntariness of the statement would not have been in issue at that stage of the trial with the result that the examination conducted would not have been full and proper. It follows that the cross examination of PW5 would not have been conducted as required at that stage as rightly contended by learned counsel for the accused. Thus the obligation of the prosecution to call PW5 as a witness in the trial within a trial remains. In the circumstances the evidence led by the prosecution is insufficient in law to support a finding that the cautioned statement was given voluntarily.

In the light of the foregoing, I ruled that the cautioned statement was not admissible.

The case of the prosecution must therefore be judged without the aid of the cautioned statement. There is no direct evidence to show that the accused was in possession of the dangerous drugs at the material time. The prosecution must therefore rely on presumptions to make out the charge with which the accused has been charged. The learned deputy public prosecutor rightly conceded that the presumption contained in s 37(d) of the Act is inapplicable as the room where the dangerous drugs was found was accessible to others. However, he contended that the facts of the case warrant the activation of s 37(g) of the Act which reads as follows:

> If any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises.

Before this presumption can be invoked in favour of the prosecution there must be evidence to show that the dangerous drugs were concealed and that the accused was the occupier of the premises. With regard to proof of concealment, the evidence shows that the dangerous drugs were hidden amongst the clothes. Thus it cannot be disputed that they were concealed in the premises. In proving the fact that the accused was the occupier of the premises the prosecution may rely on s 37(b) of the Act which reads as follows:

> a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises.

In order to rely on this presumption the prosecution must lead evidence to show that the accused had or appears to have had care or management of the premises. It must be observed that the premises where the dangerous drugs were found was occupied by four persons at the material time, two of whom being the parents of the accused. The room from which the recovery of the dangerous drugs was made was not one that was ordinarily occupied by the accused. PW8 used the room occasionally. The accused's sister's children used the room during weekends. The accused who had his own room was merely found sleeping in the room at the time of the arrest. The mere presence of a person in a room without more does not show that he had or appeared to have had care or management of the room (see *PP v Lai Ah Bee* [1974] 2 MLJ 74). The accessibility of the room to others will lead to a similar conclusion (see *PP v Md Alim bin Samad* [1998] 1 MLJ 260). It is settled law that for a person to be an 'occupier' of a room or premises within the meaning of s 37(b) of the Act he must have had exclusive occupation or exclusive use and care or management of the room or premises where the incriminating exhibits are found (see *PP v Aris bin Yunus* [1989] 1 CLJ 239; *Lee Chee Meng v PP* [1992] 1 MLJ 322; *PP v Yap Hai Ling* [1990] 1 CLJ 983; *PP v Ong Cheng Heong* [1998] 4 CLJ 209). The presumption contained in s 37(b) of the Act cannot therefore be invoked with the result that there is no evidence to show that the accused was the occupier of the premises. Section 37(g) of the Act is therefore of no avail to the prosecution. I pause to add that even if the presumption applies it only goes to show that the dangerous drugs were concealed with the knowledge of the accused (see *PP v Sukumaran a/l Sudram* [1999] 4 MLJ 462; *PP v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576). It is trite law that mere knowledge is not sufficient to constitute possession of the dangerous drugs (see *PP v Khoo Boo Hock & Anor* [1990] 2 CLJ 971); *Choo Yoke Choy v PP* [1992] 2 MLJ 632); *Yee Ya Mang v PP* [1972] 1 MLJ 120; *PP v Mohd Fairuz bin Omar* [1998] 5 MLJ 729). The evidence adduced by the prosecution is therefore insufficient to show that the accused was in possession of the dangerous drugs.

In the upshot, I was satisfied that the prosecution had not made out a prima facie case against the accused. Accordingly, I acquitted and discharged him without calling upon him to enter his defence.

Accused acquitted and discharged without being called to enter defence.

Reported by Jafisah Jaafar